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IN THE

Supreme Court of the United States

October Term, 1962

No. 1015

SINCLAIR REFINING COMPANY,

Petitioner,

v.

VILLAIN & FASSIO E COMPAGNIA, INTERNATIONALE DI GENOVA SOCIETA, RIUNITE DI NAVIGAZIONE, S.p.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	3
Conclusion	11
Appedix A—Inland Rules	12
International Rules	13–14
B—Opinions Below	15–19

Citations

Cases:

Belden v. Chase, 150 U. S. 674, 698-699	5, 10
Oaksmith v. Garner (9 Cir. 1953), 205 F. 2d 262, 266	4
Oregon, The, 158 U. S. 186, 202, 203 (1894)	8–9
Union Shipping & Trading Co. v. United States, 127 F. 2d 771, 773 (2 Cir. 1942)	7, 9
United States v. Woodbury (1 Cir. 1949), 175 F. 2d 854, 861	4

Text Books:

Farwell The Rules of the Nautical Road, 3rd Ed.	3, 4, 7, 9, 10
Knight's Modern Seamanship, 13th Ed., 1960	4
LaBoyteaux The Rules of the Road at Sea	9
Marsden Collisions at Sea, 1961 Ed.	7
Watch Officer's Guide, 9th Ed. 1961	4

PAGE

STATUTES:

Inland Rules, 30 Stat. 96—preamble 3

Article 27 (33 U. S. C. 212) 5

Article 29 (33 U. S. C. 221) 5, 10

International Rules, 26 Stat. 322 as amended 65 Stat. 406—applicability clause 33 U. S. C. 143 .. 3, 8

House Report 807, 82nd Congress, First Session, 1951 U. S. Code Congressional and Administrative Service, pp. 2331-3 8

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Sinclair Refining Company prays that a writ of certiorari issue to review the amended judgment of the United States Court of Appeals for the Second Circuit entered herein on March 18, 1963.

Citations to Opinions Below

The opinion of the District Court, printed in Appellant's Appendix below R. 153a-181a, is reported in 207 F. Supp. 700. The opinion of the Court of Appeals, printed in Appendix B, *infra* pages 16-19, is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 20, 1963 (App. B, p. 15). Rehearing was denied

but the judgment amended on March 18, 1963 (App. B, p. 19). Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The Admiralty jurisdiction of the District Court was invoked under 28 U. S. C. 1333(1).

Question Presented

Whether the "R" signal provided for in the International Rules may be used by a vessel at anchor in fog in Inland Waters notwithstanding there is no provision for such a signal in the Inland Rules and notwithstanding the specific provision of the International Rules that they "shall not apply to the harbors, rivers and inland waters of the United States" (33 U. S. C. 143; App. A, p. 13).

Statutes Involved

The statutory provisions involved are the Navigation Rules: Articles 15, 18, 27, and 29 of the Inland Rules (30 Stat. 96, 33 U. S. C. 191, 203, 212, 221); Rule 15 and the applicability paragraph of the International Rules (65 Stat. 407, 33 U. S. C. 143, 145 [c][iv]). They are printed in Appendix A, *infra*, pages 12-14.

Statement

In this Delaware River collision case, the inbound loaded tanker E. W. SINCLAIR, upon hearing, from a vessel somewhere ahead but not in sight, a three-whistle signal, "made a 20° right turn out of the channel" to avoid risk of collision. The signalling vessel proved to be the FASSIO, which lay at anchor in thick fog about 250 meters east of the channel and the SINCLAIR hit her (*per curiam* opinion, App. B, pp. 16-17). The District Judge found (1) that the FASSIO actually sounded the International "R" signal (short-long-short; R. 169a) and (2) that the SINCLAIR's master and pilot mistook it for a backing signal of three short blasts

(R. 160a). As to the question presented by this petition —whether the International "R" signal may be used by a vessel at anchor in fog in inland waters notwithstanding there is no provision for such a signal in the Inland Rules—the District Judge held in the affirmative, setting forth his reasons in detail and noting that it was a case of first impression, there being no prior decision on the point (R. 171a).

The Court below affirmed, holding that the International "R" signal "although not called for in the Inland Rules, had an appropriate meaning" and that "its omission from the Inland Rules does not prohibit its use to supplement the fog bell" (*per curiam* opinion, App. B, p. 19).

Reasons for Granting the Writ

1. Congress has forbidden the co-mingling of the International Rules with the Inland Rules. The enacting clause of the International Rules, as revised by the Act of October 11, 1951, c. 495, Section 1, 65 Stat. 406, 33 U. S. C. 143; Appendix A, p. 13, expressly provides that they

> "shall not apply to the harbors, rivers and inland waters of the United States."

Co-mingling of the two separate sets of Rules never was permitted. The preamble to the Inland Rules, as first enacted in 1897, read in part:

> "Whereas, It is desirable that the regulations relating to the navigation of all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, shall be stated in one act: Therefore, * * *."
>
> (Act of June 7, 1897, 30 Stat. 96; Farwell THE RULES OF THE NAUTICAL ROAD, 3rd Ed., p. 17).

The separation of Inland from International Rules is noted on U. S. Coast & Geodetic Survey charts (R. 42a) and correctly dealt with in *United States* v. *Woodbury* (1 Cir. 1949), 175 F. 2d 854, involving a visual signal not provided for in the Inland Rules:

> "* * * Congress in enacting the Inland Rules must have intended to establish a full and complete set of rules for inland waters, and hence we conclude that when Congress omitted to provide any signal for a given situation occurring in inland waters it meant to require no signal for that situation in those waters even though a signal was required therefor in international waters" (p. 861).

Oaksmith v. *Garner* (9 Cir. 1953), 205 F. 2d 262, 266, is to like effect.

America's foremost authority * on Rules of the Nautical Road says of the International "R" signal here involved:

> "Neither the gong signal for vessels over 350 feet in length nor the three blast warning signal (R) authorized for all vessels anchored in fog at sea can be used in the inland waters of the United States." (Farwell THE RULES OF THE NAUTICAL ROAD, 3rd Ed., p. 173).

2. The District Court recognized that the sounding of the FASSIO's International "R" signal was a departure from the Inland Rules not previously passed upon by any court (R. 171-3a). The signal was held to be justified under the Special Circumstance rule permitting

* Farwell's THE RULES OF THE NAUTICAL ROAD, published by the United States Naval Institute, has been kept current since 1954 by Commander Alfred Prunski, U. S. Coast Guard, of whom the preface to Knight's MODERN SEAMANSHIP, 13th Ed. 1960, says: "Lt. Commander Alfred Prunski, U. S. Coast Guard, revised Part III, Rules of the Road. He has succeeded the late Captain Farwell as the country's leading authority on this modern aspect of seafaring." Prunski receives similar credit in the preface to "Watch Officer's Guide," 9th Ed., 1961.

a departure from the Rules when "necessary to avoid immediate danger," the Court saying "Article 27 of the Inland Rules specifically recognizes departures for special circumstances" (R. 173a). However, the District Court also recognized that the Inland danger signal would have served the same purpose, from which it follows that no departure from the Rules was "necessary" (R. 172a). Accordingly, Article 27 provides no justification for the FASSIO's use of the "R"' signal.

Article 27 is not cited in the Court of Appeals' opinion, which relies instead upon Article 29, saying:

> "Article 29 of the Inland Rules, 33 U. S. C. Section 221 provides in part 'Nothing in these rules shall exonerate any vessel * * * from the consequences of * * * the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case'" (Opinion, App. B, p. 19).

The "special circumstances" there referred to are the same as those referred to by the District Court, namely, "any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger" (33 U. S. C. 212). As noted above, the International "R" signal was *not* "necessary" because the Inland danger signal would have served the same purpose.

Nor was the FASSIO in any "immediate danger" since the vessels still were half a mile apart when the FASSIO's second "R" was sounded and she was at anchor 250 meters outside of the dredged channel in which the SINCLAIR was proceeding. Immediate danger did not arise until after the SINCLAIR made her "20 right turn out of the channel" upon "hearing the three whistle signal." (Court of Appeals opinion, App. B, p. 17).

"Special circumstances" is a phrase of art, defined in *Belden* v. *Chase*, 150 U. S. 674:

> "* * * Obviously they [the rules] must be rigorously enforced in order to attain the object for which

they were framed, which could not be secured if the masters of vessels were permitted to indulge their discretion in respect of obeying or departing from them. Nevertheless it is true that there may be extreme cases where departure from their requirements is rendered necessary to avoid impending peril, but only to the extent that such danger demands. *The John L. Hasbrouck*, 93 U. S. 405; *The Sunnyside*, 91 U. S. 208; *The Johnson*, 9 Wall. 146; The City of Washington, 92 U. S. 31; *The Voorwarts & Khedive*, 5 App. Cas. 876; *The Byfoged Christensen*, 4 App. Cas. 669.

And while under Rule twenty-four [now 27] in construing and obeying the rules, due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger, the burden of proof lies on the party alleging that he was justified in such departure. *The Agra*, L. R. 1 P. C. 501; *The General Lee*, Irish L. R. 3 Eq. 155. Indeed, in *The Agra*, it was ruled that not only must it be shown that the departure at the time it took place was necessary in order to avoid immediate danger, but also that the course adopted was reasonably calculated to avoid that danger. And it is the settled rule in this court that when a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. *The Pennsylvania*, 19 Wall. 125, 136; *Richelieu Navigation Co.* v. *Boston Ins. Co.*, 136 U. S. 408, 422.

Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules. The Oregon, 18 How. 570" (pp. 698-699).

That decision has lost none of its authority through the years. Farwell THE RULES OF THE NAUTICAL ROAD, 3rd Ed. pp. 325-326; Marsden COLLISIONS AT SEA, 1961 Ed. p. 586.

So far as the record discloses, the FASSIO's sounding of the International "R" signal was only the second time it had ever been sounded in Inland Waters (R. 291a). Her own Delaware River pilot did not recognize it, and heard the series of blasts as "something unfamiliar" that had "no meaning" to him (R. 83-4a). Doubtless it also is unfamiliar to the many mariners who never go deep sea. Thus the International "R" signal clearly is *not* "ordinary practice" in Inland Waters. Nor was it a "precaution" for the FASSIO. Had she simply continued ringing her fog bell, the SINCLAIR would have missed her by 250 meters (R. 34a). Instead, "Believing that the signal they heard was a backing signal, they assumed that a southbound vessel was in the channel with her engines going astern." (District Court opinion, R. 160a); "the SINCLAIR's captain and pilot assumed that the safest maneuver was to get out of the channel. They preferred to risk a grounding rather than a collision" (164a); "she was faced with a dilemma; to reverse engines and stay in the channel while trying to stop, or to take her chances to the right of the channel" (166-7a). The backing signal is three short blasts and the International "R" is short-long-short. The vagaries of fog compound the confusion that is the natural result of any unauthorized signal. As said by Judge Learned Hand in *Union Shipping & Trading Co.* v. *United States*, 127 F. 2d 771 (C. C. A. 2 1942):

> "* * * We need not say that there can never be circumstances which may make it imperative for a ship to supplement the statutory signals; but ordinarily she need not, and ought not, for she will tend rather to prevent than to promote mutual understanding" (p. 773).

3. The International "R" signal was introduced by the 1948 Convention on Safety of Life at Sea, adopted by the Act of October 11, 1951, c. 495, Section 6, and made effective 2½ years later, on January 1, 1954 (Historical note, including Presidential Proclamation, 33 U. S. C. 143). This gave deep sea sailors an opportunity to learn the use of the new signal. No such advance notice is afforded by the decision below. Nor did the Judges have the benefit of hearings to determine whether the new International "R" signal is appropriate for Inland Waters; and if so, whether it should be available to vessels aground or moored as well as vessels at anchor. Legislative hearings had enabled Congress to determine (1) that the amendments to the International Rules promulgated by the 1948 Convention should be incorporated into the International Rules; and (2) that they should *not* be made applicable in Inland Waters (33 U. S. C. 143). House Report No. 807, 82nd Congress, 1st Session, 1951, U. S. Code Congressional and Administrative Service, pp. 2331-2333 notes the need for International uniformity on the high seas and the fact that in "* * * inland water areas * * * other appropriate and adequate sets of rules, regulations, and laws are now in effect" (p. 2331). The decision below ignores that separation and constitutes just such judicial tinkering with the Rules as is cautioned against in *The Oregon*, 158 U. S. 186 (1894), where the vessel sounding the statutory signal was claimed to have been at fault for failing to supplement the signal as a "precaution which may be required by the ordinary practices of seamen" (p. 203), this Court saying:

> "* * * It follows that, under all ordinary circumstances, a vessel discharges her full duty and obligation to another by a faithful and literal observance of these rules. The power to superadd to them other requirements involves the power to determine what shall be superadded, and in this particular there is room for a great and embarrassing diversity of opinion. Thus, one court might hold that, in addition to displaying the regulation light, a vessel at

anchor should swing a torch; another, that she should ring a bell; another, that she should blow a horn, beat a drum, or fire a cannon, and the result would be that a lookout would never know when he had performed his full duty to an approaching vessel" (p. 202).

* * *

"If courts were at liberty to add to the requirements of the statute, it would always be claimed that the signal added was not the proper signal that should have been used" (p. 203).

Unless and until Congress sees fit to amend the Inland Rules so as to include the "R" signal, its use is bound to lead to just such misunderstandings as occurred in the instant case. *Union Shipping & Trading Co.* v. *United States*, 127 F. 2d 771, 773 (C. C. A. 2 1942).

4. The Court of Appeals' decision originally outlawed the commonly used danger signal as misleading if sounded by a vessel under way (Appendix B, p. 18). This was amended after petition for rehearing, changing the sentence "The danger signal would have indicated that he was himself under way" by substituting "might" for "would" and adding the words "although its use in such circumstances could be sustained" (Appendix B, p. 19). This is in line with the District Judge's view that a mariner has a "choice" as to whether to use the International "R" or the Inland danger signal, notwithstanding 33 U. S. C. 143 to the contrary (R. 169a). Giving a mariner a "choice" would defeat the essential uniformity of the Navigation Rules. Laboyteaux THE RULES OF THE ROAD AT SEA, p. 3; Farwell THE RULES OF THE NAUTICAL ROAD, 3rd Ed,. p. 197. It would substitute for the immediate sounding of the familiar danger signal, the agony of indecision between two alternatives. Lives and property thus would be placed in needless jeopardy.

Decisions as to what action to take to avoid risk of collision must be made without hesitation. To achieve

that certainty, the Navigation Rules must be fixed, without offering alternatives or encouraging exceptions. *Belden* v. *Chase*, 150 U S. 674, 699. Heretofore an anchored vessel sounding the danger signal when threatened by maneuvers of something beyond the range of her fog bell has not been called upon to justify her signal; it was mandatory under Article 29 as "required by the ordinary practice of seamen." (33 U. S. C. 221; Appendix B, p. 19; Farwell THE RULES OF THE NAUTICAL ROAD, 3rd Ed., pp. 173, 199, 307. If it were true that "The danger signal might have indicated that he was himself under way", how could it be said that "its use in such circumstances could be sustained"? (Amended Opinion, Appendix B, p. 19).

Deck officers must know the Navigation Rules to qualify for a license, which may be suspended or revoked by the Coast Guard for infractions or failure to keep abreast of changes in the Rules. How are they to learn of a change that is not in the rules? Worse still, a mariner who does not know the applicable Rules is incompetent and a vessel under the command of an incompetent master is unseaworthy. The Coast Guard investigation in this case was closed without the SINCLAIR's pilot even being called as a witness after the FASSIO's master had testified that he sounded the International "R" signal (R. 83a). Had that been an appropriate signal, its misinterpretation would not have been condoned.

Shipowners must notify their masters of any change in the Navigation Rules or regulations, under penalty of being held at fault for conforming to an outmoded practice as well as being denied the right to limit liability for failure to notify the master of the new ruling. Circularization of the Sinclair fleet and all others must be deferred until the notices can be made meaningful by saying (1) whether the ruling below represents the law today; and if so, (2) whether the new signal is permissive or mandatory and

(3) whether the Inland danger signal may or may not be used as an alternative. Those questions are as yet unanswered and only this Court can resolve them.

Meanwhile, the lives of vessel personnel and passengers are jeopardized daily by the decision below, which disrupts the essential uniformity of the Inland Rules of Navigation.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

EUGENE UNDERWOOD,
Counsel for Petitioner.

April 9, 1963

APPENDIX A

The pertinent provisions of the Navigation Rules for harbors, rivers and inland waters (33 U. S. C. 151-232) are:

"§ 191. *Sound signals for fog, etc., generally* (Art. 15)

• • •

In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this section shall be used as follows, namely:

• • •

(d) A vessel when at anchor shall, at intervals, of not more than one minute, ring the bell rapidly for about five seconds" (33 U. S. C. 191).

Article 18, Rule III:

"If when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle" (33 U. S. C. 203, Rule III).

"§ 212. *Special circumstances requiring departure from rules* (Art. 27).

In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger" (33 U. S. C. 212).

• • •

"§ 221. *Usual additional precautions required generally* (Art. 29)

Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case" (33 U. S. C. 221).

Entirely separate from the above Inland Rules are the International Rules (26 Stat. 322 as amended, 65 Stat. 406; 33 U. S. C. 143-147d) the pertinent provisions of which are:

"§ 143. *Regulations for preventing collisions at sea; proclamation by President; applicability*

The President is authorized to proclaim the regulations set forth in sections 144-147d of this title for preventing collisions involving water-borne craft upon the high seas, and in all waters connected therewith. Such proclamation, together with the regulations, shall be published in the Federal Register, and after the effective date specified in such proclamation, such regulations shall have effect as if enacted by statute and shall be followed by all public and private vessels of the United States, and by all aircraft of United States registry to the extent therein made applicable. Sections 144-147d of this title shall not apply to the harbors, rivers, and inland waters of the United States; to the Great Lakes of North America and their connecting and tributary waters as far east as the lower exit of the Lachine Canal in Montreal in the Province of Quebec, Canada; to the Red River of the North and the rivers emptying into the Gulf of Mexico and their tributaries; nor, with respect to aircraft, to any territorial waters of the United States. Oct. 11, 1951, c. 495, § 1, 65 Stat. 406" (33 U. S. C. 143).

• • •

"§ 145m. *Sound signals (Rule 15)—Power-driven, and sailing vessels*

• • • •

(c) In fog, mist, falling snow, heavy rainstorms, or any other conditions similarly restricting visibility, whether by day or night, the signals prescribed in this section shall be used as follows:

• • •

(iv) A vessel when at anchor shall at intervals of not more 1 minute ring the bell rapidly for about 5 seconds. In vessels of more than 350 feet in length the bell shall be sounded in the forepart

of the vessel, and in addition there shall be sounded in the after part of the vessel, at intervals of not more than 1 minute for about 5 seconds, a gong or other instrument, the tone and sounding of which cannot be confused with that of the bell. Every vessel at anchor may in addition, in accordance with section 145j of this title, sound three blasts in succession, namely, one short, one prolonged, and one short blast, to give warning of her position and of the possibility of collision to an approaching vessel" (65 Stat. 415; 33 U. S. C. 145m).

APPENDIX B

(Opinion of United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 218—October Term, 1962

(Argued January 22, 1963 Decided February 20, 1963)

Docket No. 27850

VILLAIN & FASSIO E COMPAGNIA, INTERNATIONALE DI GENOVA SOCIETÀ, RIUNITE DI NAVIGAZIONE, S.p.A., as owner of the Motor Vessel ANGELA FASSIO,

Libellant-Appellee,

v.

Tank Steamer E. W. SINCLAIR,
SINCLAIR REFINING COMPANY,

Claimant-Respondent-Appellant.

Before:

FRIENDLY, SMITH and MARSHALL, *Circuit Judges.*

Appeal from decree of the United States District Court for the Southern District of New York, Edelstein, J., holding the Tank Steamer E. W. Sinclair solely at fault in a collision with the Motor Vessel Angela Fassio.

Affirmed.

ALBERT D. JORDAN, New York, N. Y. (Ehrich, Stock, Valicenti, Leighton & Holland, Haight, Gardner, Poor & Havens, and Robert J. Nicol, on the brief) *for appellee.*

STANLEY R. WRIGHT, New York, N. Y. (E. Lisk Wyckoff, and Burlingham Underwood Barron Wright & White, on the brief) *for appellant.*

PER CURIAM:

This is an appeal from a decree in a consolidated cause in the admiralty awarding damages and costs to the owner of the Motor Vessel Angela Fassio against the Tank Steamer E. W. Sinclair as solely responsible for a collision of the two vessels, and dismissing Sinclair's libel against the Fassio, in the District Court for the Southern District of New York, David N. Edelstein, District Judge. We find no error and affirm the judgment.

On December 3, 1959 the tanker E. W. Sinclair, a 520 foot vessel of 10,907 gross tons, fully loaded with 16,000 tons of fuel oil, was proceeding up the Delaware River about four miles astern of the motor vessel Angela Fassio, 492 feet long, of 7,016 gross tons. Encountering thick fog about 9:00 a. m. near Buoy 42, the Fassio turned to starboard, and anchored about 250 meters east of the channel. She sounded the bell signals called for in the Inland Rules, 33 U. S. C. § 19(d), applicable in this location. The Sinclair had been traveling at a sea speed of 13.3 knots which she reduced to about 10 knots before entering the fog in which visibility was no more than 100 meters. Assisted by a tidal current of 1½ knots she was proceeding in the fog at a speed over the ground of 11½ knots. Her radar was inoperable. Fassio's radar was working and picked up the Sinclair at a range of some three miles. Sinclair was ob-

served on the screen to be approaching along the easterly edge of the channel at about 12 knots speed. When she was about one mile away the Fassio sounded the international "R" signal on her whistle (one short, one long, one short). At .5 mile she repeated the signal. On passing Buoy 42 and hearing the three whistle signal, the Sinclair made a 20° right turn out of the channel and collided with the Fassio, tearing her plates and frames from the forward end of her No. 1 hold to the after part of her No. 3 hold, approximately 180 feet.

The Sinclair was plainly guilty of faulty navigation in proceeding into heavy fog, with visibility of barely more than half her length, with her radar out of order, in and near a heavily traveled channel, at so high a speed. She contends, however, that the Fassio gave a three short blast signal, signifying a vessel backing, and so confused the Sinclair as to cause the collision. The factual issue as to the nature of the signal given was resolved against the Sinclair's contention on conflicting testimony and the determination is not clearly erroneous. We find no error here. *McAllister* v. *United States*, 348 U. S. 19 (1954).

Appellant contends, however, that even if the signal given was the international "R", the Fassio was at fault in giving it, since it is not found in the Inland Rules, and was likely to confuse another vessel. This contention appears to us not well founded. Article 29 of the Inland Rules, 33 U. S. C. § 221, provides in part "Nothing in these rules shall exonerate any vessel * * * from the consequences of * * * the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." Under the circumstances here we cannot agree that the sounding of the signal by the master of the Fassio was a fault. A ship was bearing down on him in thick fog at high speed. His required bell signal,

which he was sounding, was of limited range. He could not know whether the approaching vessel was using radar. Some supplemental notice of his own presence was a natural response to the situation with which he was faced. The danger signal would have indicated that he was himself under way. The "R", although not called for in the Inland Rules, had an appropriate meaning (vessel anchored in the fog) known to all mariners familiar with the International Rules. We hold that its omission from the Inland Rules does not prohibit its use to supplement the fog bell and find no fault in its use by the Fassio here. The decree of the District Court is affirmed.

(Amendment of Opinion)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

VILLAIN & FASSIO E COMPAGNIA, INTERNATIONAL DI GENOVA SOCIETA, RIUNITE DINAVIGAZIONE, S.p.A., as owner of the Motor Vessel ANGELA FASSIO,

Libellant-Appellee,

v.

Tank Steamer E. W. SINCLAIR, SINCLAIR REFINING COMPANY,

Claimant-Respondent-Appellant.

Before:

FRIENDLY, SMITH and MARSHALL,
Circuit Judges.

The petition for rehearing is denied. The wording of the opinion dated February 20, 1963 is amended so that the last paragraph of the opinion will read as follows:

> "Appellant contends, however, that even if the signal given was the international "R", the Fassio was at fault in giving it, since it is not found in the Inland Rules, and was likely to confuse another vessel. This contention appears to us not well founded. Article 29 of the Inland Rules, 33 U. S. C. § 221, provides in part 'Nothing in these rules shall exonerate any vessel * * * from the consequences of * * * the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.' Under the circumstances here we cannot agree that the sounding of the signal by the master of the Fassio was a fault. A ship was bearing down on him in thick fog at high speed. His required bell signal, which he was sounding, was of limited range. He could not know whether the approaching vessel was using radar. Some supplemental notice of his own presence was a natural response to the situation with which he was faced. The danger signal might have indicated that he was himself under way, although its use in such circumstances could be sustained. *Victorias Milling Co.* v. *The SS Gulfport*, 166 F. Supp. 396 (S. D. N. Y. 1958), aff'd mem. 262 F. 2d 349 (2 Cir. 1958). In any case, the 'R', although not called for in the Inland Rules, had an appropriate meaning (vessel anchored in the fog) known to all mariners familiar with the International Rules. We hold that its omission from the Inland Rules does not prohibit its use to supplement the fog bell and find no fault in its use by the Fassio here. The decree of the District Court is affirmed."

HENRY J. FRIENDLY,
J. JOSEPH SMITH,
THURGOOD MARSHALL,
U. S. C. JJ.

March 18, 1963.